Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
MCI Telecommunications Co., Inc.	)	
	)	
Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 pursuant to §§ 251, 252, and 253 of the Communications Act of 1934, as amended	)	CC Docket No. 97-100

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS"), pursuant to Public Notice DA 97-1190, released June 6, 1997, hereby files its initial comments in support of the Petition for Expedited Declaratory Ruling filed by MCI asking the Commission for a declaration that certain sections of the Arkansas Telecommunications Regulatory Reform Act preempted by the Federal Telecommunications Act of 1997.

ALTS is the national trade association representing more than thirty facilities-based carriers. ALTS previously filed comments in this docket in connection with the petition filed by ACSI that sought a Commission declaration as to preemption of some of the same Arkansas provisions as the MCI petition seeks. As those comments demonstrate the members of ALTS will be severely discouraged in their attempts to provide competitive

telecommunications services to the people of Arkansas should the FCC refuse to preempt provisions of the Arkansas Act that are clearly inconsistent with the Federal Telecommunications Act of 1996. The Commission must recognize that the fact that a second competitive local exchange carrier has sought a declaration of preemption supports the conclusion that competitive carriers view the Arkansas Act as a severe impediment to the provision of competitive local exchange services, particularly in areas other than urban areas of the state.

The comments filed opposing the ACSI petition in this docket assert that there is no conflict between the Arkansas statute and the Federal statute. These comments infer that the issue presented to the Commission is simply whether a statute is preempted when the state legislature directs its Public Service Commission to comply with federal law, but limits its ability in certain areas to go beyond federal law. As the ACSI and the MCI petitions demonstrate, however, in addition to the general antagonism of the Arkansas statute to competitive provision of service, there are numerous specific provisions in the Arkansas Act that conflict with the Federal statute and therefor are preempted.

I. THE UNIVERSAL SERVICE PROVISIONS OF THE ARKANSAS ACT CLEARLY CONFLICT WITH THE UNIVERSAL SERVICE PROVISIONS OF THE FEDERAL ACT.

The ALTS comments in response to the ACSI petition demonstrated that with respect to Universal Service rights and

obligations the Arkansas Act has a number of restrictions and limitations that are inconsistent with the Federal Act and that severely limit competitive carriers' ability to become an "eligible carrier" and therefore to provide service particularly in high cost and rural areas. The limitations on non-ILEC carriers becoming "eligible carriers" for purposes of receiving either federal or state universal service funds and the inconsistencies with the Federal Act are adequately documented in the ALTS comments and the MCI petition and will not be reiterated here.

The Arkansas provisions not only conflict with specific federal provisions on eligibility, they conflict with the very purpose of the federal legislation. Congress sought to assure the continued availability of quality services at just and reasonable rates in all areas of the nation through an explicit mechanism that is equitable, nondiscriminatory and competitively neutral. Congress intended that the beneficiaries of universal service funding be the American people, not particular carriers. The Arkansas statute turns the federal universal service program on its head by making the primary beneficiaries the incumbent local exchange companies.

Section 4(e)(4)(A) of the Arkansas Act ensures that if the Federal Universal Service support for any incumbent local exchange carrier decreases, the Arkansas Universal Service Fund or an increase in rates will make up the difference. It is hard to imagine a more blatant attempt to protect the incumbents

against the affects of Federal policy and the competition that it seeks to encourage. It is not possible that a guarantee that incumbent LECs (but not competitive LECs, who may be eligible carriers) receive the same amount of money that they made under the old system is either equitable nor nondiscriminatory.

A guarantee of revenues to the incumbent local exchange carrier and not competitive carriers, together with the almost impossible test for eligibility for universal service funds for competitive carriers constitutes a barrier to entry in violation of Section 253.[1]

II. THE ARKANSAS STATUTE IMPERMISSIBLY INTERFERES WITH THE PUBLIC UTILITY COMMISSION'S REQUIRED REVIEW OF STATEMENTS OF GENERALLY AVAILABLE TERMS AND ARBITRATED AGREEMENTS.

As MCI points out in its petition the Arkansas Act impermissibly alters the level of scrutiny required by the 1996 Act for both Statements of Generally Available Terms ("SGATs") and negotiated agreements. The Federal Act requires State Commissions to carefully review these agreements and SGATs and to reject them unless certain findings are made. The Arkansas statute mandates, on the other hand, that the Arkansas Commission accept SGATs and negotiated agreements unless the Commission

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[1] In its Comments in this docket, the Northern Arkansas Telephone Company argues that "the non-designation of an entity as eligible to receive universal service support is not a legal "barrier to entry" in most telecommunications markets. By implication, even Northern Arkansas Telephone Company is admitting that "non-eligibility" would be a barrier to entry in high cost areas. There is simply nothing in Section 253(b) that allows a state to a state to erect such a barrier.

makes certain findings. Clearly there is a direct conflict in these sections and the Arkansas statute is therefore preempted.

In enacting the federal legislation, Congress mandated that state commissions carefully review negotiated agreements and SGATs for one simple reason. There is an extreme imbalance in the bargaining position of the CLECs vis a vis the ILECs. CLECs are "negotiating" with monopolies that have virtually 100 percent of the local exchange market and have no incentive to open those markets to competition. There are many reasons why a CLEC desiring to enter a market may sign an agreement that does not satisfy the requirements of Sections 251 or 252 or is not in the public interest. Congress wanted to ensure that a neutral third party entity closely scrutinize agreements and SGATS to ensure that they satisfy federal requirements.

III. THE ARKANSAS PROVISIONS RELATING TO THE RURAL TELCO EXEMPTION FROM THE REQUIREMENTS OF SECTION 251 INCONSISTENT WITH THE FEDERAL ACT AND THEREFORE PREEMPTED.

In its initial comments ALTS asserted that the Arkansas statute is inconsistent with the Federal exemption from compliance with the requirements for Section 251 for rural carriers. MCI agrees and seeks a declaration of preemption for those provisions that are inconsistent.

In its reply comments filed on May 20, 1997, the Northern Arkansas Telephone Company argues that the Arkansas statute is not in conflict with the Federal statute because "Section 251(f)(1)(B) expressly gives the states the right `to conduct an

inquiry for the purpose of determining whether to terminate the [rural] exemption" and that the "Arkansas Act constitutes[s] a wholly consistent and appropriate exercise of the State's jurisdiction over termination of Section 251(f) exemption." (Reply Comments at 3).

Northern Arkansas is incorrect in its reading of the statute. First, of course, it must be remembered that the "rural exemption" is just that: an exemption from the normal requirements placed on incumbent local exchange carriers. As such the exemption should be strictly construed.

In any event, Northern Arkansas misreads the statute in assuming that Congress was granting to the states significant discretion on whether to lift the exemption. Section 251(e)(1)(A) and (B) provide:

> (A) EXEMPTION.- Subsection (c) of this section shall not apply to a rural telephone company until (I) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).
> (B) STATE TERMINATION OF EXEMPTION AND IMPLEMENTATION SCHEDULE.- The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, <u>the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254</u> . . . .

The crux of the issue is whether the State Commissions are required to lift the exemption under certain circumstances (i.e., the appropriate findings are made) or whether the state commissions are given the discretion to lift the exemption or keep it as they see fit. The Federal Act uses the term "shall"; there is little discretion left except to make findings as to whether or not the request is "unduly economically burdensome, is technically feasible, and is consistent with Section 254".[2]

The additional criteria that the Arkansas statute requires to be met prior to the lifting of the exemption are inconsistent with the test articulated in the Federal Statute. While there is little legislative history as to the meaning of "unduly economically burdensome" it necessarily must mean something more than the economic burdens placed on an incumbent that competition will inherently entail. A number of the criteria that the Arkansas statute lists as impacting the decision as to whether a rural company's exemption will be lifted are effects that presumably will flow naturally from the simple emergence of competition. The incumbent's ability to attract capital and

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[2] While there is little legislative history on the meaning of this section, what history has been found supports the conclusion that the state must terminate the exemption if it makes the required findings. See Statement of Congressman Hastert at 141 Cong. Rec H8454 ("States must terminate the exemption if the expanded interconnection request is technically feasible, not unduly economically burdensome, [and] is consistent with certain principles for the preservation of universal service" (emphasis supplied).

incur debt will naturally be affected by competition, but under the Federal statute such an effect would not result in the continuation of the rural exemption.

CONCLUSION

For the foregoing reasons, ALTS supports the Petition for Expedited Declaratory Ruling filed by MCI Telecommunications Co., Inc.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of the Association for Local Telecommunications Services was served July 7, 1997 on the following persons by first-class mail or by hand service as indicated.

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